No. 15150

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENN WEIBLE and PATRICIA WEIBLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF OF APPELLANTS.

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Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF OF APPELLANTS.

Jurisdiction.

This is an action for refund of income taxes paid by appellant Glenn Weible for the calendar year 1947 and by appellants Glenn and Patricia Weible for the calendar years 1948 and 1949. Jurisdiction of the District Court was invoked under 28 U. S. C. Sections 1340 and 1346 on the ground that this cause arises under the 1939 Internal Revenue Code Sections 322 and 3772 (1954 Internal Revenue Code Sections 6402, 6532 and 7422). [R. 3, 20].

On March 15, 1948, appellant Glenn Weible and on March 15, 1949, and March 15, 1950, appellants Glenn and Patricia Weible filed with the Collector of Internal Revenue for the Sixth District of California Federal

Individual Income Tax Returns for the calendar taxable years 1947, 1948 and 1949 respectively and paid Federal income taxes for those years in the amounts of $1,320.13, $983.96 and $1,305.70 respectively. Claims for refund were filed with the Collector of Internal Revenue for the Sixth District of California within three years from the time said returns were filed, namely on January 31, 1951, in the amount of $696.13 for the year 1947, $983.96 for the year 1948 and $1,305.70 for the year 1949. All of said claims were disallowed by the Collector of Internal Revenue by notices dated March 27, 1952. All of the above jurisdictional facts were alleged in the complaint, admitted in the answer and included in the findings of fact of the District Court [R. 3, 4, 6, 9, 10, 12-24, 31-33]. This action was filed within two years from the date of disallowance of said claims, namely on July 14, 1953 [R. 19]. Judgment was entered April 6, 1956 [R. 40]. Notice of Appeal was filed May 9, 1956 [R. 44]. This Court has jurisdiction under 28 U. S. C. Sec. 1291.

Statement of the Case.

Question Presented.

The only question presented is whether appellants were bona fide residents of a foreign country or countries during the taxable years 1947, 1948 and 1949 within the meaning of Section 116 (a) (1) of the Internal Revenue Code of 1939 and thus entitled to the income tax exemption provided by that section.

Statutes and Regulations Involved.

1939 Internal Revenue Code Section 116 (a) (1) and Treasury Regulations 111, Sections 29.116-1, and 29.211-2 are set forth in the Appendix, *infra*, pages 1-3.

Evidence.

The case was tried upon the pleadings and exhibits attached thereto [R. 3-25], the testimony of two witnesses, Michael Harris, Vice President in charge of the export division of Max Factor and Co., the employer of appellant Glenn Weible [R. 48-58] and Glenn Weible, one of the appellants [R. 59-85] and defendant's Exhibits A and B [R. 85, 89-96].

The pleadings show that appellant Glenn Weible is a citizen of the United States [R. 4, 20].

The testimony of Michael Harris and Glenn Weible shows that Glenn Weible was employed by Max Factor & Company (Factor), a cosmetics manufacturer, from 1938 to 1941 as a cosmetic chemist. During the war he was employed by Lockheed Aircraft Company [R. 59, 60]. After the war Factor determined to modify its method of foreign operations by converting its foreign branches from distributors of Factor products imported from the United States to manufacturing operations within the foreign countries themselves. In 1945, by reason of his special knowledge of the company's operations and his abilities, Weible was re-employed for the specific task of planning, organizing and supervising the establishment of manufacturing plants for the company in foreign countries [R. 49, 61]. Weible entered into an employment agreement with Factor whereby he agreed to undertake these duties and to remain permanently outside the United States in the performance of his duties except for short periods of training and consultation [R. 50-51, 61-62].

From January until May, 1946, Weible was employed in Mexico in expanding Factor's operation there. Then in June, 1946, Weible was sent by his employer to Syd-

ney, Australia, for the purpose of establishing for the first time a manufacturing plant in that country. No definite period was set by either Weible or his employer for the completion of that project since at the time they were unable to tell how long it would take. Weible had to arrange for a physical plant, procure local sources of supply for the company's product, train personnel to run the operation and supervise the new plant until such time as the local staff could run it independently [R. 51-52, 63-65].

In Australia Weible leased an apartment, purchased his own food and generally provided for his own needs. He frequented a local social and turf club and fully entered into the social life of Sydney. His friends and associates were predominantly Australians [R. 67-69].

When he departed for Australia, Weible's first wife was regularly employed in a responsible position with a motion picture studio and she remained behind with the intention of joining him after he became settled in Australia. However, in September, 1947, she obtained an interlocutory decree of divorce. Pursuant to that decree she was given all of the family home furnishings and other personal effects, and from that time to the present Weible has maintained no home of any kind in the United States. As part of the settlement with his wife Weible purchased her interest in a vacant lot in Los Angeles. He also retained a bank account in that city [R. 65-67].

Australia allowed an exemption from income tax to foreign citizens for two years, but after the expiration of the exemption period, Weible paid income tax to Australia on his salary from Factor [R. 69-70].

Weible was recalled to the United States by Factor in October, 1948, for the purpose of proceeding to

Canada to establish a manufacturing plant for the company there. He returned with his second wife, Patricia, an Australian citizen whom he married in the United States, and after a two week stay in the United States, went to Toronto on his assignment. He and his wife rented an apartment and set up housekeeping. As in Australia, they made all of their own personal arrangements and their social contacts were among Canadians. No definite time was fixed on Weible's stay in Canada but he agreed to remain as long as necessary to accomplish his assignment which by its nature was indefinite as to duration [R. 52-53, 70-73].

A reorganization in the British branch of Factor in in June, 1949, required the company to order Weible directly to England in July, 1949, to assist in the training of supervisory and factory personnel in the methods and procedures for the manufacture of its products. Weible agreed to remain in England until this assignment was completed. At that time neither Weible nor his employer could predict how long that would be. Weible remained continuously at the British branch until December, 1950, when he was called back to the United States, and after a two month retraining and review of new techniques, was sent to South America, where he resided at the time of the trial herein on January 9, 1956 [R. 54-55, 73-76].

While in England, the Weibles made their own living arrangements and entered into the social life of the community. They were regular visitors of an English yacht club and they purchased an English automobile [R. 74-76].

All the income involved in the claims for refund in this action are attributable to the earnings of Glenn Weible for personal services rendered to Factor [R. 35-36].

During the years in question, Factor withheld tax from Weible's wages. An officer of that company, as attorney for the taxpayers, filed Federal income tax returns on their behalf for the years 1947, 1948 and 1949 reporting as taxable income the salary paid to Weible.

The government offered in evidence a document purporting to be an application made by Glenn Weible under the provisions of the Australian Tax Assessment Act. Appellant entered an objection on the ground that the certification on the document was insufficient foundation for its admission, which ground of objection was amplified by leave of the District Court [R. 82] in Plaintiff's Supplemental Memorandum [R. 26-30]. The District Court did not rule specifically on the admission of this evidence [R. 87] but inferentially ruled it admissible by paragraph XV of its Findings of Fact relating to the contents of Government's A [R. 36].

Findings, Conclusions and Judgment.

Findings of fact, conclusions of law and judgment were entered on April 6, 1956 [R. 40]. The Court concluded that appellant Glenn Weible was not a bona fide resident of Australia for the calendar year 1947, that appellants Glenn Weible and Patricia Weible were not bona fide residents of Australia and Canada during the calendar year 1948, and that the appellants were not bona fide residents of Canada and England during the calendar year 1949 within the meaning of Section 116 of the Internal Revenue Code of 1939, and that therefore the earnings of Glenn Weible from Factor were taxable [R. 39]. The judgment ordered that the appellants take nothing by their complaint [R. 40].

Specification of Errors.

1. The Court erred in failing to find that pursuant to his agreement with his employer and during the years 1947, 1948 and 1949 Weible agreed to and intended to remain continuously and indefinitely in a foreign country or countries in the performance of his duties except for short periods of training and consultation.

2. The Court erred in failing to find that the purpose of Weible in going to Australia, Canada and England was of such a nature that an extended stay in those countries may have been necessary for its accomplishment.

3. The Court erred in concluding that appellant Glenn Weible was not a bona fide resident of Australia during the calendar year 1947 within the meaning of Section 116 of the Internal Revenue Code of 1939.

4. The Court erred in concluding that appellants were not bona fide residents of Australia and Canada during the calendar year 1948 within the meaning of Section 116 of the Internal Revenue Code of 1939.

5. The Court erred in concluding that appellants were not bona fide residents of Canada and England during the calendar year 1949 within the meaning of Section 116 of the Internal Revenue Code of 1939.

Summary of Argument.

1. The conclusion of the District Court, that appellants were not bona fide residents of a foreign country or countries within the exemption afforded by Section 116 (a) (1) of the Internal Revenue Code of 1939, is a conclusion of law, and as such may be reviewed by this Court on the basis of the entire record in the case.

2. It was the intent of Congress in enacting the 1942 amendment to Section 116 to exempt from taxation the income of citizens who were engaged in foreign trade and who while living abroad became assimilated into the foreign community where they lived. The appellants are in that class of citizens to whom the exemption provided by Section 116 was intended to apply.

3. The Treasury Regulations implementing Section 116 provide that an intent to remain abroad indefinitely on a project which by its nature may require an extended stay abroad for its completion constitutes a person a bona fide resident of foreign countries within the meaning of Section 116. Appellant Glenn Weible intended to remain indefinitely in the foreign service of his employer and when he had completed one foreign assignment to proceed to the next. He in fact carried out his intention from 1946 when he undertook his first foreign assignment through January 9, 1956 the date of trial herein. At all times during the taxable years involved appellants were bona fide residents of foreign countries and so entitled to the exemption provided in Section 116.

4. The Court decisions interpreting Section 116 and the related Treasury Regulations support the position of appellants. Appellants have found no case involving a career foreign service employee that reaches a contrary result. *Downs v. Commissioner* (C. C. A.-9, 1948), 166 F. 2d 504, cert. den. 334 U. S. 832, and similar cases are distinguishable on the ground that the taxpayers there involved went abroad on a government or construction project for a period of limited duration, retained their domestic residences and in no way entered into the life of or assumed the expenses of living in the foreign community where they lived.

I.

The Conclusion of the District Court That Appellants Were Not Bona Fide Residents of a Foreign Country or Countries During the Taxable Years Involved Should Be Set Aside by This Court After Review of the Entire Record.

The conclusion that a taxpayer is a bona fide resident of a foreign country or countries within the meaning of Section 116 of the Internal Revenue Code of 1939, is a conclusion of law and as such is subject to judicial review unlimited by the "clearly erroneous" rule governing review of findings of fact. *Commissioner v. Fiske* (C. C. A.-7, 1942), 128 F. 2d 487, cert. den. 317 U. S. 635. Where, as in the present case, the facts were not in dispute, the Circuit Courts of Appeals have reviewed the conclusions of the trial court in the light of the entire record and where such conclusion was erroneous have set it aside. *Swenson v. Thomas* (C. C. A.-5, 1947), 164 F. 2d 783; *Seeley v. Commissioner* (C. C. A.-2, 1951), 186 F. 2d 541; *Myers v. Commissioner* (C. C. A.-4, 1950), 180 F. 2d 969. This Court, therefore, may determine this appeal on the basis of the entire record unrestricted by the findings of fact and conclusions of law of the District Court.

II.

Appellant Glenn Weible Was a Bona Fide Resident of Australia in 1947 and Both Appellants Were Bona Fide Residents of Australia, Canada and England in 1948 and 1949 and Therefore Exempt From Income Tax in Those Years Under the Provisions of Section 116 (a) (1) of the Internal Revenue Code of 1939.

Section 116 (a) (1) of the 1939 Internal Revenue Code exempts from income tax earned income of citizens of the United States from sources without the United States who are bona fide residents of a foreign country or countries during the taxable year.

Appellant Glenn Weible is a citizen of the United States [R. 4, 20] and the income on which the taxes herein sought to be refunded were paid consisted of earned income from sources without the United States as that phrase is used in Section 116 (3) [R. 35-36] (Reg. 111, Sec. 29.116-1, Appen., *supra*) and therefore the only question before the Court is whether appellants were bona fide residents of Australia, Canada and England in the taxable years involved.

A. Section 116(a) Was Intended by Congress to Exempt From Tax the Income of Taxpayers in the Category of Appellants.

The exemption granted by Section 116 (a) was first extended to a person who was a "bona fide nonresident" of the United States for more than six months during the taxable year (Revenue Act of 1926, c. 27, 44 Stat. 9). The exemption thus provided was intended to encourage foreign trade. *Downs v. Commissioner* (C. C. A.-9, 1948), 166 F. 2d 504, 507. Mere physical absence from the country for six months was sufficient to qualify for

the exemption, *Commissioner v. Fiske, supra,* and in practice the exemption resulted in discrimination in favor of persons receiving compensation from nongovernmental sources (H. R. No. 2333, 77th Cong., 1st Sess., p. 93, 1942-2 Cum. Bull., 372, 412). To correct this abuse in 1942 the exemption was limited to persons who were bona fide residents of a foreign country or countries during the taxable year. The Senate Committee on Finance reported that it had formulated the limited exemption because it had been convinced by cases brought to its attention that complete elimination of the exemption would work a hardship on United States citizens who were bona fide residents of foreign countries, and who for that reason were confronted with higher living costs than those of domestic residents (Senate Report 1631, 77th Cong., 2d Sess., 1942-2 C. B. 504, 548).

A citizen who had established a home abroad in order to compete in foreign markets was found in the Senate Committee hearings to be confronted with expenses uncommon to residents of the United States (Hearings on the Senate Committee on Finance on H. R. 7378, 77th Cong., 2d Sess., Vol. 1, pp. 733-775).

> "The Committee sought to embrace in the term 'bona fide resident' all whose assimilation into the foreign life was sufficient to expose them to the burdens of adjusting to the foreign environment." (Goodman, District Judge, *Meals v. United States* (1953, D. C. N. D. Calif), 110 Fed. Supp. 658, 661.)

The inclusion of the words "or countries" in the language of Section 116 (a) (1) indicates the intent of Congress to include within the exemption those persons whose work abroad might take them to several countries during the course of the taxable year.

Glenn Weible was employed for the specific and exclusive purpose of serving in the foreign department of an American company engaged in foreign trade [R. 49-51, 61-62]. Under the terms of his employment agreement he agreed to remain permanently on foreign assignment [R. 50, 61], and in fact he remained outside the United States in the performance of his duties for Factor from 1946 through the date of the trial of this action in January, 1956 [R. 76]. Appellants established a home in each of the foreign countries where they lived, and lived on the economy of those countries. They leased apartments, shopped for their food and other needs in local stores, attended local clubs, entertained and were entertained by local people, paid local taxes when required [R. 69-70] and completely assimilated themselves in the life of the foreign country in which they found themselves [R. 67-69, 71-72, 73-75].

By reason of the purpose of their presence abroad and the manner in which they conducted their lives in the foreign countries where they resided appellants were in that class of citizens which Congress intended to exempt from income tax when in 1942 it amended Section 116 (a) to exempt from taxation the income of citizens who were bona fide residents of a foreign country or countries during the taxable year.

B. During the Taxable Years Appellants Intended to Live Abroad for an Extended and Indefinite Period of Time, and Therefore Were Bona Fide Residents of a Foreign Country or Countries Under the Criteria Set Forth in the Treasury Regulations.

The statute does not define the term "bona fide resident" and therefore the Treasury Regulations are especially authoritative because they serve to implement a

purpose not set forth in detail. *Seeley v. Commissioner,* 186 F. 2d 541, 543. Treasury Regulation 111, Section 29.116-1, in effect during the years in question provided,

> "Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4, and 29.211-5 relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual."

Section 29.211-2 declares that a person's intentions determine whether he is a "resident" and that one who is present without any "definite intention as to his stay" is a resident. When an extended stay may be necessary to accomplish his purpose "he becomes a resident" if he makes his home "temporarily" where he has gone, though it may be his intention all the time "to return to his domicile abroad when the purpose for which he came has been consummated or abandoned."

"Residence" as so defined has a completely different meaning than "domicile," *Downs v. Commissioner,* 166 F. 2d 504, 507, and therefore the findings of the District Court that appellants did not intend to live permanently in Australia, Canada or England [Findings of Fact XX, R. 38] are irrelevant to the issue of this case.

Appellant Glen Weible was employed with the specific understanding that he would work exclusively in the foreign department of Factor. When one foreign assignment was completed he was to proceed to the next, returning to the United States only for brief periods of training and vacation [R. 50, 62]. He was sent abroad to establish manufacturing plants in various foreign countries where none had previously existed [R. 49-50,

61]. This project was a complicated one, requiring the establishment of many contacts in the foreign country, the training of foreign personnel in the special techniques of the company and the supervision of the new operation until the foreign personnel could be safely left on their own. No definite time could be fixed for the completion of such a complicated project, and in fact none was. By its very nature Weible's mission abroad was one that required an extended length of time to accomplish [R. 51-55, 61-65, 71, 73-76]. Both Weible and his employer intended that he remain abroad for that indefinite period, and in fact since he entered the foreign service of Factor he has returned to the United States for brief visits on only four occasions up to the trial of this action in January, 1956 [R. 63, 70, 76]. It is difficult to imagine a citizen who by his intentions and actions more accurately fits the definition in the Treasury Regulations of a bona fide resident of a foreign country or countries.

C. The Courts Have Consistently Applied Section 116 in Favor of Taxpayers Who, Like Appellants, Have Demonstrated an Intention to Remain Abroad Indefinitely in Employment Abroad.

Glenn Weible has demonstrated by his actions that his intent to remain in the foreign service of Factor was bona fide. Under similar facts the courts have consistently concluded that the income of the taxpayer was exempt from taxation under Section 116.

The case of *Meals v. United States* (D. C. N. D. Cal. 1953), 110 Fed. Supp. 658, is strikingly similar to the present case on its facts. There the taxpayer went to Germany in December, 1945, as an employee of American Telephone and Telegraph Company. The duration of his stay was to be indefinite. His duties were to train

personnel and establish communications plants. He rented an apartment from the United States Army and entered the social life of his community. In June, 1947, he married a German girl and because of Army regulations then left Germany. He paid no income tax to Germany and enjoyed Army commissary and Post Exchange privileges. The Court concluded he was a bona fide resident of Germany during 1946, stating (110 Fed. Supp. 662):

> "The whole pattern of plaintiff's life in Germany is consistent with his claim of residence there. He went to Germany planning to remain there for a substantial and indefinite period of time. He was embarking upon employment which promised to develop into a career. He abandoned entirely the home he had previously maintained in the United States. . . . He worked with German personnel and entered into the social life of the community to such an extent that he married a German girl."

Except for the geographical variation those words could have been written about appellant Glenn Weible.

In *White v. Hofferbert* (U. S. D. C. Md., 1950), 88 Fed. Supp. 457, the taxpayer was employed in the foreign service of International Telephone and Telegraph Company for an indefinite period in an executive capacity. He was assigned to Sweden from December, 1942, to February, 1944, when he was sent to Spain where he remained through 1946. During the years 1944 and 1945 he was called back to the United States for consultations and was physically present in the United States for a six months' period in each of those years. He paid no income tax to Sweden or Spain. He was held to have been a bona fide resident of Sweden and Spain during the years 1943, 1944 and 1945. The Court gave the con-

trolling reason for its conclusion at 88 Fed. Supp. 460 where it said:

> "His original engagement as a foreign service officer of the I. T. & T. in November, 1942, was for an *indefinite period,* and it is entirely reasonable to find that his intention was to remain in the foreign service of that Company as a career or at least for many years."

See also:

Seeley v. Commissioner, supra;

Swenson v. Thomas (C. C. A. 5, 1947), 164 F. 2d 783;

Larsen, 23 T. C. 599;

Stierhout, 24 T. C. No. 54;

Glackin v. Commissioner (D. C. S. D. Ill., 1952), 10 Fed. Supp. 372;

Pierce, 22 T. C. 493, acq. Int. Rev. Bull., 1954 C. B. 5;

Hamer, 22 T. C. 343;

Rose, 16 T. C. 232;

Baehre, 15 T. C. 236;

Dickinson, T. C. Memo. Dec. 20, 851 (M)1955.

The cases in which the taxpayers have been held not entitled to exemption from income tax as bona fide foreign residents are clearly distinguishable from the present one for the reason that they all involve American technicians working temporarily abroad in war work or construction projects. In these cases the taxpayers intended to return to the United States upon completion of their contracts of employment on a specific project, they generally retained their domestic residences, their living needs while

abroad were furnished by their employers and consequently they did not live on the economy of the foreign country, or identify themselves with the customs or the community life of the foreign country.

See for example:

Downs v. Commissioner, supra;
Johnson, 7 T. C. 1040;
Brown, 12 T. C. M. 1172;
Hertig, 19 T. C. 109.

The entire record in this case shows a clear intent by appellants to remain abroad for an indefinite period. This conclusion is not weakened by the fact that they maintained a bank account in the United States, *Meals v. United States, supra; Hamer, supra; Pierce, supra,* or the fact that they paid no income taxes to Canada or England, *White v. Hofferbert, supra; Rose, supra.*

Nor is it material to the issue of this case that Weible executed an application for certificate from the Secondary Industries Commission of Australia as set forth in Defendant's Exhibit A [R. 89-96]. The statutory meaning of the terms "resident" and "non-resident" derive their meaning from the context in which they are used. *Downs v. Commissioner,* 166 F. 2d 504, 507, 508. The fact that Weible applied for and obtained exemption from Australian income tax has no significance in determining whether he was a "bona fide resident" there as that term is used in Section 116 (a) (1) of the United States Internal Revenue Code of 1939.

The exemption of the earnings of a citizen resident in a foreign country from income taxation was not motivated by the desire to eliminate the possibility of a double tax on the same income since another provi-

sion of the Internal Revenue Code specifically allows as a credit against income tax due the United States, income tax paid to a foreign country. Section 131 (a) (1), Internal Revenue Code of 1939. The Congressional Committee was aware that some foreign countries levy income taxes and others do not and that in many foreign countries a much greater proportion of total taxation is represented by various indirect taxes borne by persons living there than in the United States. Hearings of the Senate Committee on Finance on H. R. 7378, 77th Congress, 2d Sess., Vol. 1, pages 745, 746, 749, 752, 757, 775. *Meals v. United States,* 110 Fed. Supp. 658, 662. Weible's intent to remain in Australia for an indefinite period of time until his work there was completed is clear from the record [R. 50, 52, 62, 63]. The completion in the application of the item "Date of Departure (anticipated)" as November, 1947, was no declaration of a contrary intent, but only a best guess as to when the job would be done. The record is also clear that Weible intended when his Australian assignment was done to proceed to the next foreign assignment, so that for the entire year he must have been a bona fide resident of foreign countries under Section 116 regardless of his status as a resident under Australian law.

Conclusion.

The decision of the District Court is contrary to the intent of Congress, the letter and spirit of the Treasury regulations and the decisions of the Courts in both this circuit and elsewhere and should be reversed.

Respectfully submitted,

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APPENDIX.

INTERNAL REVENUE CODE:

Sec. 116 (as amended by the Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 148 (a)). EXCLUSIONS FROM GROSS INCOME.

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.—

(1) FOREIGN RESIDENT FOR ENTIRE TAXABLE YEAR.—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

* * * * * * * * *

(3) DEFINITION OF EARNED INCOME.—For the purposes of this subsection, "earned income" means wages, salaries, professional fees, and other amounts received as compensation for personal services actually rendered, but does not include that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered. In the

case of a taxpayer engaged in a trade or business in which both personal services and capital are material income producing factors, under regulations prescribed by the Commissioner with the approval of the Secretary, a reasonable allowance as compensation for the personal services rendered by the taxpayer, not in excess of 20 per centum of his share of the net profits of such trade or business, shall be considered as earned income.

Treasury Regulations 111, Promulgated Under the Internal Revenue Code:

Sec. 29.116-1. Earned income from sources without the United States. For taxable years beginning after December 31, 1942, there is excluded from gross income earned income in the case of an individual citizen of the United States provided the following conditions are met by the taxpayer claiming such exclusion from his gross income: (a) It is established to the satisfaction of the Commissioner that the taxpayer has been a bona fide resident of a foreign country or countries throughout the entire taxable year; (b) such income is from sources without the United States; (c) the income constitutes earned income as defined in section 25 (a) if received from sources within the United States; and (d) such income does not represent amounts paid by the United States or any agency or instrumentality thereof. Hence, a citizen of the United States taking up residence without the United States in the course of the taxable year is not entitled to such exemption for such taxable year. However, once bona fide residence in a foreign country or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a bona fide resident of a foreign country.

Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4, and 29.211-5 relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual.

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Sec. 29.211-2. DEFINITION.—A "nonresident alien individual" means an individual—

(a) Whose resident is not within the United States; and

(b) Who is not a citizen of the United States.

The term includes a nonresident alien fiduciary.

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.